

# Texas State Board of Examiners of Psychologists

## Newsletter Vol. 27, No. 1

### **Selected Texas Laws Affecting the Practice of Psychology**

*The original version of this article appeared in the Board's Fall 1998 Newsletter, with an updated and revised version appearing in the Summer 2000 Newsletter. All statutory references are to Texas law, unless otherwise indicated.*

*This outline is meant to make our licensees aware of some of the lesser known laws that affect the practice of psychology. It is not meant to constitute legal advice or be read as a comprehensive analysis of all the laws affecting the practice of psychology. It is the responsibility of the reader to determine the applicability of the law to their unique circumstances.*

### **I. MENTAL HEALTH RECORDS**

#### **A. Duty of Confidentiality: Chapter 611 of the Health and Safety Code**

This statute provides that with delineated exceptions, communications with and records regarding a patient are confidential and may not be disclosed. The privilege may be claimed by the patient or a person acting on the patient's behalf (including a professional).

The exceptions to this confidentiality are found in §611.004 (outside a judicial proceeding) and §611.006 (in a judicial or administrative proceeding). These exceptions include disclosure to a person who has the written consent of the patient, disclosure in a criminal proceeding, and disclosure in a judicial proceeding affecting the parent-child relationship (such as a divorce or child custody case).

The chapter also grants a patient a right to access to the content of their mental health record (§611.0045), and requires a professional respond to such a request within 15 days (§611.008). In

addition, it provides legal remedies for improper disclosure or failure to disclose (§611.005), which include injunctive relief and damages.

Note: Under §611.0045(b), a professional may deny access to any portion of a record where the professional determines that release would be harmful to the patient's physical, mental, or emotional health. However, this standard differs from that found in HIPAA at 45 C.F.R. §164.524(a)(3)(i), which requires a determination that the information is reasonably likely to endanger the life or physical safety of the requestor or another person. Because the HIPAA standard provides a patient with a greater right of access to their records, the state law standard is preempted by HIPAA.

#### **B. Disclosure to Law Enforcement under HIPAA: 45 CFR 164.512**

Certain disclosures of protected health information are permitted under this HIPAA regulation, without the written authorization of the individual or giving the individual an opportunity to agree or object. One such authorized disclosure is to law enforcement, but only in response to a court order, grand jury subpoena, or an administrative request. With regard to an administrative request, the disclosure must meet the conditions of §164.512(f)(1)(ii)(C). A disclosure of information to law enforcement is also authorized for the purpose of identifying or locating a suspect, fugitive, material witness, or missing person, although that disclosure must be limited (§164.512(f)(2)).

Note: Confidential information disclosed pursuant to §164.512(f) should be disclosed only in response to a court order, warrant, subpoena, writ, or summons issued as part of a criminal proceeding. State law provides a patient with a greater right of privacy than HIPAA with regard to disclosures to law enforcement (§611.006(a)(7) of the Health and Safety Code), thus HIPAA is preempted by state law.

**C. Reportable Diseases: Chapter 81 of the Health and Safety Code (the Communicable Disease Prevention and Control Act)**

Although this information is considered confidential under the provisions described in Chapter 611 of the Health and Safety Code (described above), reportable diseases, including acquired immune deficiency syndrome (AIDS) and human immunodeficiency virus infection (HIV) must be reported by health professionals to the local health authority or the Texas Department of Health under §81.042, *if a report has not already been made under that section*. The report must include all information known concerning the person who has or is suspected of having the disease, and its contents are expressly made confidential by §81.046.

**D. Disposal of Business Records: Chapter 72 of the Business and Commerce Code**

These provisions require that businesses disposing of records containing personal identifying information modify those records by shredding, erasing, or other means so as to make the personal identifying information unreadable or undecipherable. The statute provides for a civil penalty in an amount not to exceed \$500 for each business record disposed of improperly.

**E. Unauthorized Use of Identifying Information: Chapter 521 of the Business and Commerce Code (the Identity Theft Enforcement and Protection Act)**

This statute prohibits the unauthorized use or possession of the personal identifying information of another person (§521.051), requires that businesses utilize reasonable procedures to protect from the unlawful use or disclosure of such information, including proper destruction of records containing such information (§521.052), and imposes a duty to notify affected individuals of any computer security system breach involving sensitive personal information (§521.053). The statute also provides for an injunction and hefty civil penalty (§521.151), as well as a private cause of action under the Deceptive Trade Practices-Consumer Protection Act (§521.1520).

**F. Standards for Electronic Health Information: The Health Information Technology for Economic and Clinical Health Act (HITECH Act) (42 U.S.C. §§ 17931 – 39)**

Under the regulations pertaining to the HITECH Act, electronic health information must be protected by encryption, and exchanges must occur using an encrypted and integrity protected link (45 CFR §170.210).

The Act also imposes data breach notification requirements for unauthorized uses and disclosures of *unsecured* PHI, which essentially means unencrypted PHI.

**II. DUTY TO REPORT**

**A. Sexual Exploitation by Mental Health Services Provider: Chapter 81 of the Civil Practice and Remedies Code**

This chapter creates a private cause of action for damages suffered by a patient or former patient from sexual exploitation by a mental health services provider (§81.002). An employer can also be held liable where the employer knows or has reason to know of the sexual exploitation and fails to take action (§81.003).

It also imposes a duty to report where a provider has reasonable cause to suspect or where a patient alleges sexual exploitation by a mental health services provider during the course of treatment (§81.006). A person making such a report in good faith is immune from resulting civil or criminal liability (§81.007).

**B. Abuse to a Child: Chapter 261, Subchapter B of the Family Code**

This statute imposes a duty on professionals to report suspected abuse or neglect (or potential abuse or neglect) of a child within 48 hours (§261.101). This duty does not require certainty that abuse has occurred, but merely *cause to believe* (in other words, abuse is suspected based on known information). The duty may not be delegated to another, and the report must be made to an appropriate agency (§261.103).

S.B. 152, 83rd Leg., R.S. (2013) amended §261.101 to also include a duty to report if a person has cause to believe that an adult was a victim of abuse or neglect as a child and the person determines in good faith that disclosure

of the information is necessary to protect the health and safety of another child, or an elderly or disabled person.

**C. Abuse to the Elderly or Disabled: Chapter 48, Subchapter B of the Human Resources Code**

This subchapter imposes a duty to immediately report the suspected abuse, neglect, or exploitation of an elderly or disabled person (§48.051). The report may be made orally or in writing, and must be made to the Department of Protective and Regulatory Services. Under this subchapter, a person filing a report is immune from civil or liability arising from the report (§48.054), and their identity is confidential, with limited exceptions (§48.101).

**III. PARENT/CHILD RELATIONSHIP ISSUES**

A child or minor is anyone under the age of 18, unless they have had their minority “status” removed by marriage or court order.

**A. Consent to Treatment: Chapter 32, Subchapter A of the Family Code**

Certain non-parents may consent to treatment when the person otherwise having the right to consent cannot be contacted, and that person has not given notice to the contrary. Some examples are a grandparent of the child, an adult sibling, and an adult with actual care, control, and possession of the child who has written authorization to consent from a person having that right (§32.001). The child itself is also allowed to consent to treatment under certain circumstances (§32.003), may be provided counseling in certain circumstances (§32.004), and may be examined without consent in cases of suspected abuse or neglect (§32.005).

Consent to treat a minor child must be in writing, signed by the person giving consent, and must contain specified information (§32.002).

**B. Rights of Parents: Chapter 153, Subchapter B of the Family Code**

Unless limited by court order, a parent appointed as a “conservator” has a right of access to the

child’s records (§153.073), as well as a right to consent to treatment of a child while the child is in their possession (§153.074). If you are unsure about a parent’s respective rights, ask for, and read the decree or order before taking further action. The decree or order will normally specify these rights with respect to each parent.

**IV. BUSINESS PRACTICES**

**A. Solicitation of Patients: Chapter 102 of the Occupations Code**

This statute prohibits any remuneration to or from another person for securing or soliciting a patient or patronage for or from a person licensed, certified, or registered by a state health care regulatory agency (§102.001). It does not prohibit payments or practices permitted under the Federal Anti-Kickback statute (42 U.S.C. Section 1320a-7b(b)) or its regulations (§102.003), or prohibit advertising unless it is false, misleading, deceptive, or not readily subject to verification (§102.004). The statute provides for various penalties for violations, including disciplinary action by the regulatory agency that issued a license or certification to the person (§§102.008-.011).

**B. Healing Art Practitioners: Chapter 104 of the Occupations Code (the Healing Art Identification Act)**

Under this Act, those engaged in the healing arts who use their name on professional materials must identify the healing art the person is licensed to practice (§104.003). Under §104.002, the healing art includes any system, treatment, operation, diagnosis, prescription, or practice to ascertain, cure, relieve, adjust, or correct a human disease, injury, or unhealthy or abnormal physical or mental condition.

When using the title "doctor" as a trade or professional asset or on any manner of professional identification, including a sign, pamphlet, stationery, or letterhead, or as a part of a signature, a person other than a person described by §104.003 shall designate the authority under which the title is used or the college or honorary degree that gives rise to the use of the title (§104.004).

**C. Unprofessional Conduct: Chapter 105 of the Occupations Code**

This provision describes several actions that constitute “unprofessional conduct” by a health care provider, including knowingly presenting a false or fraudulent claim for payment under an insurance policy, and provides that such actions constitute grounds for revocation or suspension of the provider’s license.

**D. Professional Name: Chapter 71 of the Business and Commerce Code (the Assumed Business or Professional Name Act)**

This Act provides that a person using an “assumed name” (see definition in §71.002(2)) to conduct business or render a professional service, must file a certificate specifying the legal name and assumed name of the individual or entity (§71.051, for unincorporated persons). The certificate must be filed in the county clerk’s office where the business is located (§71.054) and must contain specified information about the business (§71.052). Special provisions of the Act apply to incorporated businesses and other entities. The Act provides criminal penalties for violations (§71.202) and fraudulent filings (§71.203).

**E. Telehealth: Chapter 111 of the Occupations Code**

This statute requires a health care professional obtain informed consent before providing telehealth services (§111.002) and take appropriate steps to ensure confidentiality (§111.003).

**F. Internet Activity: Chapter 106 of the Occupations Code**

Pursuant to §106.001, the fact that an activity occurs through the use of the internet does not affect a licensing authority’s power to regulate the activity or person.

**G. Usurious Interest: Chapter 302, Subchapter A of the Finance Code**

This chapter provides a default interest rate of 6% a year for a creditor where no agreement exists concerning interest or an agreement for interest exists but fails to specify the rate (§302.002). It also provides a maximum interest of 10% a year unless otherwise provided by law (§302.001).

**Changes to the Duty to Report Child Abuse**

A May 30, 2012 opinion issued by the Attorney General (GA-0944) stated that licensees were not required to report the childhood abuse or neglect of an adult patient. However, with the enactment of S.B. 152, 83rd Leg., R.S. (2013) on June 14, 2013, Tex. Fam. Code Ann. §261.101 was amended to require licensees to report the childhood abuse or neglect of an adult patient, if the licensee determines in good faith that the information is necessary to protect the health and safety of another child or an elderly or disabled person. The criminal penalties for failing to make such a report are set out in Tex. Fam. Code Ann. §261.109.

**Board Welcomes New General Counsel**

The Board is pleased to welcome Scott Merchant as its new General Counsel. Mr. Merchant, who started in October 2013, is a native of Alaska but has called Austin home since 1980. He graduated with an International Relations degree from Southwest Texas State University in 1997 and received his Juris Doctor from Washington & Lee University School of Law in Lexington, Virginia in 2003. He has been employed as an attorney by the State of Texas since 2006.

**TEXAS STATE BOARD OF EXAMINERS OF PSYCHOLOGISTS DISCIPLINARY SANCTIONS RATIFIED AT THE  
OCTOBER 10, 2013 BOARD MEETING**

<b>NAME</b>	<b>CITY</b>	<b>NATURE/INFRACTION</b>	<b>DISCIPLINARY ACTION</b>	<b>DATE</b>
Bereolos, Nicole Margaret	Plano	Conducted evaluations without the requisite competency, and issued reports containing errors and unsupported opinions	License suspended(with contingent probation), administrative penalty, additional professional development, and practice monitor	10/10/13
Cole, Collier Michael	Galveston	Utilized outdated tests, accepted appointment for both forensic and therapy services in same case, and failed to recognize a lack of objectivity and undue influence when providing services.	Probated suspension, administrative penalty, and additional professional development	10/10/13
Johnson, Rebecca Lynn	Houston	Failed to timely report arrest	Administrative penalty and additional professional development	10/10/13
Kramer, Sarah H.	Wichita Falls	Rendered forensic opinion concerning child custody while serving as children's treatment provider	License reprimanded, administrative penalty, and additional professional development	10/10/13
Moore, Stephen A.	Houston	Failed to provide proof of required professional development hours	Administrative penalty	10/10/13

**TEXAS STATE BOARD OF EXAMINERS OF PSYCHOLOGISTS DISCIPLINARY SANCTIONS RATIFIED AT THE  
FEBRUARY 13, 2014 BOARD MEETING**

<b>NAME</b>	<b>CITY</b>	<b>NATURE/INFRACTION</b>	<b>DISCIPLINARY ACTION</b>	<b>DATE</b>
Bernstein, Dana Nicole	Plano	Failed to adequately document joint session between spouses.	Reprimand, administrative penalty, and additional professional development	02/13/14
Bryan, Gerald Lee	El Paso	Provided visitation recommendations in a child custody dispute without performing an evaluation and with having a therapeutic relationship with the child	Reprimand, administrative penalty, and additional professional development	02/13/14
Carillo, Jorge Hernando	Houston	Failed to provide records as required by law	Administrative penalty and additional professional development	02/13/14
Fooks, Marcella Irene	Plano	Failed to provide records as required by law	Administrative penalty and additional professional development	02/13/14
Owen, April Olivia	Austin	Failed to report legal action as required by law	Administrative penalty and additional professional development	02/13/14
Pelfrey, Michael Clendon	Amarillo	Failed to display license as required by law	Administrative penalty and additional professional development	02/13/14
Phillips, Alethea R.M.	San Antonio	Supervised an individual who provided psychological services but was not licensed nor exempt from licensure	Administrative penalty	02/13/14
Ricks, Sean Patrick	Houston	Provided psychological services on a delinquent license	Reprimanded, administrative penalty, and professional development	02/13/14